(1989) 11 CAL CK 0002

Calcutta High Court

Case No: Matter No. 454 of 1987

Indian Rayon and Industries Ltd		APPELLANT
	Vs	
Assistant Collector of Central Excise and Others		RESPONDENT

Date of Decision: Nov. 23, 1989

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 11B, 2

Citation: (1990) 26 ECC 251 : (1990) 29 ECR 106

Hon'ble Judges: Ajit K. Sengupta, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Ajit K. Sengupta, J.

This writ application is directed against the refusal of the respondents to refund the amount allegedly collected unlawfully from the first petitioner the Indian Rayon Corporation Ltd. since renamed as Indian Rayon & Industries, Ltd. (Hereinafter, referred to as "the Company"). The said Company is engaged in the business of, inter alia, manufacturing Electrical Insulators at its factory situated at Rishra in the State of West Bengal. The said business is carried on by the Company under the name and style of "JAYASHREE INSULATORS". The said Insulators are of Porcelain and are sold by the Company with or without metal fittings. The said Insulators are used for transmission and distribution of electrical energy.

2. The second petitioner is a shareholder of the said Company and has filed the writ petition for violation of his fundamental rights as a shareholder of the said Company.

3. In the writ application the petitioners have challenged certain directions and findings in an order dated August 6, 1986 passed by the Collector of Central Excise (Appeals), Calcutta on the appeal of the Company against an order passed by the

Assistant Collector of Central Excise dated March 3, 1986. In the said appeal of the company against the said order dated March 3, 1986 of the Assistant Collector, the Collector (Appeals) accepted the submissions of the Company as to the classification of the said Electrical Insulators but decided against the company insofar as the period for which refund of the duty paid was to be allowed. Although the period in dispute was from April 1970 to February 6, 1978 the Collector (Appeals) restricted the refund for a period of 6 months only purportedly u/s 11B of the Central Excises & Salt Act, 1944 (in short "the Act"). The petitioners have challenged the order of the Collector (Appeals) insofar as the directions for granting refund for 6 months was made. The order of the Assistant Collector dated March 3, 1986 is challenged by the petitioners in its entirety. However, the said order dated March 3, 1986 has HOW merged in the order of the Collector (Appeals) dated. August 6, 1986.

4. The short question which falls for consideration in this writ application is whether the Collector (Appeals) was justified in directing that "consequential relief shall be confined to 6 months as prescribed u/s 11B of the Central Excise & Salt Act, 1944.

5. A brief narration of the facts for the purpose of appreciation, the proceeding and circumstances under which the said order dated August 6, 1966 was passed by the Collector (Appeals) is given hereunder.

6. By Finance Act, 1961, item 23 B was inserted in the First Schedule of the Act whereby Chinaware and Porcelain-ware were subjected to Excise duty.

7. On August 17, 1987 the Excise Authorities required the petitioners to pay Excise Duty on the said Insulators on the basis that the same were porcelain-ware. Thereafter several circulars were from time to time issued by the Excise Authorities giving contradictory directions as to the assessment of the said insulators as Porcelain-ware.

8. On 28th November, 1967 the Central Board of Excise and Customs issued a circular to the effect that if fully assembled insulators including metal parts are cleared from the factory, the same would be assessed as porcelain-ware if the value of the porcelain in the assembly was more than 50% of the total value of the insulators and if it was less than 50% such insulators would not be covered under item No. 23 B. After the said circular dated November 28, 1967, Central Excise duty on the said insulators was levied on the basis of the guidelines contained therein.

9. On 21st January, 1974 the Central Board of Excise and Customs issued a tariff advice, inter-alia, to the effect that electrical insulators made of porcelain with or without metal parts were classifiable under item No. 23 B and that duty was payable under the said item No. 23 B on the value of the insulators including the value of the metal parts irrespective of the proportion of metal. The Superintendent of Central Excise thereafter by a letter dated 12th February, 1974 required the first petitioner to pay duties on the said insulators manufactured at its factory as per the said tariff advice dated 21st January, 1974. Such duties on the basis of the said Tariff advice

and as directed by the Central Excise Authorities were collected from the first petitioner in respect of the clearance taken on and from 12th February, 1974.

10. On 12th February, 1975 the Madras High Court delivered a judgment in the case of English Electric Company of India Ltd. v. Superintendent of Central Excise and Ors. reported in 1979 ELT 36 holding, inter-alia, that electric insulators (H.R.C. Cartridge Fuse Links) are not and cannot be said to be porcelainware and that the same cannot be covered by item No. 23B of the first schedule to the said Act. It was further held in the said judgement that simply because the said fuse links were made of porcelain, the same cannot be covered by the said item No. 23B. The said decision in the case of English Electric Company of India Ltd. (supra) was followed by the Madras High Court in the case of W.S. Insulators of India Ltd. v. Secretary, Ministry of Finance reported in 1976 ELT 160. In the case of W.S. Insulators of India Ltd. it was, inter-alia, held that the porcelain contents of the lightening arresters cannot be subjected to duty under item No. 23 B of the first schedule to the said Act in as much as the same could not be regarded as porcelainware.

11. The petitioner No. 1 came to know about the said decision in the case of English Electric Company of India Limited for the first time in or about August, 1977. From the said decision the petitioner No. 1 for the first time discovered the true and correct legal position to the effect, inter alia, that the said insulators were not at all classifiable under the said tariff Item No. 23B and that no duty on the said insulators could be levied thereunder. Immediately thereafter the petitioner No. 1 addressed a letter dated August 20, 1977 to the Collector of Central Excise informing him about the said decision and stating, inter-alia, that no duty on the said insulators could be levied under the said Tariff Item No. 23B. It was further stated in the said letter that till receipt of the decision of the Collector on the said issue, the first petitioner would go on paying the said duty under Item No. 23B under protest Another letter in this connection and recording, inter-alia, about the payment of said duty under protest was addressed by the first petitioner on October 17, 1977.

12. On 9th September, 1977 a trade notice was issued by the Collectorate of Central Excise and Customs, West Bengal, Calcutta seeking to clarify, inter-alia, that only the porcelain part of the insulators should be assessed to duty as porcelainware under item No. 23B and a complete insulator would not be assessable under Item No. 23B but would be assessed under Item No. 68 of the first schedule to the said Act. On the same date i.e. on September 9, 1977 a letter was also addressed by the Deputy Collector of Central Excise to the First petitioner requiring it to pay the duty as per the said trade notice issued on September 9, 1977. Thereafter some further correspondence was exchanged between the first petitioner and the Central Excise Authorities. The Assistant Collector of Central Excise informed the first petitioner that insulators have to be assessed to duty at two stages, firstly under item No. 23B as porcelainware before the metallic parts were fitted and then again under item No. 68 after the metallic parts were fitted.

13. The first petitioner thereafter made enquiries into the matter and came to know that insofar as the factories manufacturing such insulators in various others parts of the country were concerned, they were being required to pay Central Excise Duty only on the complete insulators including the porcelain and metallic parts thereof under item No. 68 of the first schedule to the said Act and that no other duty was required to be paid by the said manufacturers on the porcelain parts separately. In the circumstances the first petitioner again addressed a letter dated January 12, 1978 to the Assistant Collector requesting him, inter-alia, to allow the first petitioner to clear the said insulators manufactured at the factory by paying central excise duty only under item No. 68.

14. On 26th December, 1977 the first petitioner filed refund application claiming refund of the excess amounts collected from it on the said insulators during the period from April 1970 onwards. The said refund claim was, however, returned by the Department alleging some irregularities and after curing the alleged defects the same was again submitted by the first petitioner on June 23, 1978. The said refund application was filed for refund of the amounts collected from the first petitioner under item No. 23B after deducting the amounts payable on the said insulators under item No. 68.

15. As no appropriate action in the matter was taken by Central Excise Authorities and as the Central Excise Authorities insisted for payment of their said wrongful and illegal demands, the petitioners filed a writ petition before this Court on or about February 6, 1978 challenging, inter-alia, all purported orders passed and/or assessments made as regards levy/collection of Central Excise Duty on the porcelain part of the said insulators and/or the said insulators under item No. 23B of the first schedule to the said Act and claiming refund of all amounts collected from the first petitioner under the said item No. 23B on the said insulators and/or porcelain part thereof. In the said writ petition the petitioners also challenged the legality/validity of all proceedings initiated and/or trade notices issued seeking to levy and/or demand central excise duty on the said insulators and/or porcelain parts thereof under item No. 23B of the first schedule to the said Act On the said writ petition Rule Nisi was issued and an interim order was also made on February 6, 1978 CR. No. 814(W) of 1978). The said interim order was passed in terms of prayer (f) of the writ petition. The interim order is as follows:

Injunction restraining the respondents from giving effect to or making any assessment on the basis of the said impugned trade notice dated 9th September, 1977, or imposing or demanding payment of any excise duty under tariff item No. 23B on the porcelain past of insulators manufactured by the petitioners and from imposing any excise duty on the complete electrical insulators manufactured and removed by fee petitioners save and except tariff item 68.

16. In the meantime the SLP filed by Government of India against the said judgment and order of the Madras High Court in She ease of English Electric Company of India

Ltd (supra) was heard and dismissed by the Supreme Court on September 8, 1977. The said proceedings were marked before the Supreme Court as SLP (CIVIL) No. 317 of 1977.

17. By the Finance Act, 1979 an explanation was added to the said tariff item No. 23B clarifying that the said item does not include electrical insulators or insulating fittings or parts of such insulators or insulating fittings. The said Matter was finally heard and. disposed of by a judgment and order dated July 22, 1983 passed by Mr. Justice Chittatosh Mookherjee, as His Lordship then was. In the said judgment the learned Judge considered the said judgment of the Madras High Court and the Circulars and Trade Notice of the Board. It was noted in the said judgment that the company had prayed for quashing of the assessments of Excise Duty under Item 23B and for directing the respondents to refund all excise duties already recovered. The learned Judge was not inclined to decide the dispute in the writ petition. The learned Judge observed that only after evidence was given as to the popular meaning of the expression "Porcelain-ware" it would be possible to pronounce whether the Porcelain parts of the Insulator were independent and separate goods liable to be assessed under Item 23B of the Act. The operative part of the said judgment of His Lordship is set out herein below:

I accordingly, propose to quash the assessments made under Item No. 23B of the First Schedule of the Central Excises and Salt Act,1944 upon the petitioners'' finished product and to remit the matter for fresh assessment in accordance with law.

I, accordingly, make this Rule absolute, quash the assessments of excise duty upon electric insulators made partly of porcelain and partly of metal during April 1970 upto the date of the issue of the instant Rule and command the respondents to pass fresh orders for assessment or for refund as the case may be. The respondents after giving opportunities to the parties would be at liberty to again decide in accordance with law whether during the aforesaid period porcelain parts of the said insulators were liable to levy of excise duty under Item No. 23B of the First Schedule of the Central Excises and Salt Act, 1944.

18. No appeal was preferred against the said judgment dated July 22, 1983 of this Court by either the petitioner or the respondents and the same became final and binding.

19. Pursuant to the said judgment of this Hon''ble Court the Assistant Collector on July 24,1984 passed an order holding that the said Insulators were not Porcelain-ware which could be assessed under Item 23B of the Tariff Schedule. It was further held by the Assistant Collector that the said goods could only be assessed under Item 68 of the Tariff Schedule. Strangely, however and contrary to the said Judgment of this Court in the said order the Assistant Collector held that the refund claims would be decided separately on merits according to the provisions of the Act. Against the said order of the Assistant Collector an appeal was preferred by

the Department before the Collector (Appeals). The Company filed cross-objections in the said appeal. The Collector (Appeals) by his order dated May 1, 1985 set aside the said order of the Assistant Collector and directed him to pass a fresh assessment in accordance with law. The Collector inter alia held as under:

This order of the Assistant Collector referred to the term ''material period'' which has been discussed by him in the earlier portion while considering the background leading to the present dispute and the. decision of the Calcutta High Court in Civil Rule No. 814(W) of 1978 wherein Their Lordships have stated that the subject matter of this Rule is the assessments. made from April 1970 upto the date of instant Rule. It may ''be mentioned that tariff Item No. 68 came into force with effect from March 1975 whereas the Assistant Collector by referring to the ''material period'' sought to classify the said goods under T.I. 68 from April 1970 till 1.3.1975 when there was no existence of the tariff Item No. 68 in the Central Excise Tariff. This order is, therefore, impractical and against the provisions of law and has been passed without study of Tariff Items in question and application of mind. It may be observed that the adjudicating officer should have disposed of the matter as required in pursuance of the directive of the Hon''ble High Court, Calcutta instead of spiting of the same one for the purpose of refund. To say the least, this is against the spirit of the direction of the Hon''ble High Court.

20. Thereafter the Assistant Collector passed another order dated March 3, 1986 in which contrary to his earner order he held that the Porcelain portion of the Insulator was liable to be assessed to duty under Item 23B upto February 28, 1975 and thereafter on and from March, 1975 under Item 68 of the Tariff Schedule. The Assistant Collector further observed that the refund should be granted only for a period preceding 6 months from the date of submission of the refund claim since the claim for the period prior thereto was barred by limitation under Rule 11 of the Central Excise Rules, 1944 (in short "the Rules"). This is one of the orders challenged in the instant writ application.

21. On the appeal of the Company against the said order dated March 3, 1986 the Collector (Appeals) set aside the order of the Assistant Collector holding that the Porcelain portion of the Insulators were assessable to duty under Item 23B. By the said order he, however, held that the refund should be limited to a period of 6 months. The order of the Collector (Appeals) to the extent it limited the refund for a period of 6 months is challenged in this writ application.

22. Against the said order of the Collector (Appeals) insofar as he limited the refund for a period of six months the Company filed an appeal before the Tribunal in order to save limitation and. without prejudice to its lights and. contentions in this writ petition then to be filed.

23. The Central Excise authorities also filed an appeal against the said order of the Collector (Appeals) before the Tribunal and prayed that the said order relating to

classification of the goods should be. stayed. The Tribunal rejected the said stay application. It may be mentioned that the Tribunal had in the case of Bengal Potteries Limited decided the identical question relating to classification against the Department. The order was passed in the case of Bengal Potteries on 11.1.1985 where it was, inter alia, held that the said insulators were classifiable only under Item No. 68 and not under item No. 23B. No further steps against the order of the Tribunal in case of Bengal Potteries were taken by the department.

24. On these facts the contention of the learned Counsel for the petitioner is that the relief sought for in this writ application can only be granted by this Court and the Tribunal is not competent to grant the same. The scope of the said order and Judgment of this Court in the said C.R.No. 814(W) of 1978 needs to be considered. The Excise authorities are acting in violation of the said judgment and order and in fitness of things the matter should be adjudicated by this Court.

25. Secondly, it is contended that the assessments since 1970 are involved and the remedy of appeal before the Tribunal and thereafter by way of Reference to this Court would cause undue delay and hardship. The remedy by way of the writ application is more speedy and efficacious. In the writ application no issue on facts is involved. Only pure questions of law as to the jurisdiction of the Excise authorities in the matter of granting of the refund on assessments are involved.

26. In my view the contentions raised by the Id. Counsel for the petitioners have substance.

27. The issue as to whether the said Electrical Insulators are assessable as Porcelain-ware or not under Item 23B of the Tariff Schedule is not involved herein. The Collector (Appeals) has held that the said Insulators are not assessable as Porcelain-ware.

28. The only issue which falls for consideration in this application is whether the order of the Collector (Appeals) upholding the order of the Assistant Collector to the effect that refund of the duty illegally recovered cannot be granted for more than a period of 6 months form the date of the claim is sustainable in law ?

29. It is no doubt true that the assessee has an alternative remedy under the Act to challenge the decision of the Collector. But it is not an absolute bar to the maintainability of the writ petition. Where only legal issue has to be decided for the purpose of granting relief to an assessee, and where such issue is involved in a large number of years or where the question involved goes to the root of the jurisdiction of the authority, this Court in its writ jurisdiction may entertain the application. This remedy is more speedy and efficacious.

30. On merits also, this application must succeed. The direction of the Collector (Appeals) to restrict the refund upto a period of 6 month can not be sustained for the reasons mentioned hereafter.

31. By the said judgment dated July 22, 1983 in the said C.R. No. 814 (W) of 1978 this Court was pleased to quash all the assessments of Excise Duty upon Electrical Insulators during April 1970 up to the date of the issue of the Rule, namely February 6, 1978. This Court further directed the respondents to pass fresh orders of assessment or for refund as the case may be. Once the assessment orders are quashed the entire matter is at large. The assessment proceeding has to take place from the very inception, namely from the stage of the clearance of the goods and /or the filing of the Returns. After the assessments are made the duty, if short paid, is to to be paid by the assessee and if the duty is paid in excess it is to be refunded to it For amounts due to the assessee as a result of the orders of assessments no refund application or claim is required to be made. Such refunds flow as a consequence of the assessment order itself.

32. In an assessment to the Excise Duty two aspects are involved: (1) the classification of the goods, that is, the item of the Tariff Schedule under which the goods in question should fall; and (2) the determination of the assessable value with reference to which the duty is to be calculated and assessed. This Court set aside the assessments with a direction to redetermine the classification of the goods and to pass fresh orders of assessment. If the contention of the respondents that refund cannot be granted beyond a period of 6 months is to be upheld it would mean that the quashing of the assessments by this Court from the period of April 1970 to the date of the issuance of the Rule was meaningless, futile and wholly academic. If the quashing of the assessments could not give any relief to the assessee on the ground of limitation as is sought to be pleaded by the respondents then the entire exercise for determining the classification of the goods or for making the fresh assessments was meaningless. Such a situation, is wholly unwarranted and untenable.

33. In a case where fresh assessments are to be made and if as a consequence of such assessments amounts become due and refundable to the assessee then under no circumstances can it be said that the period of limitation for making the claim for refund had started at any time prior to the making of the order of assessment itself. The right of the assessee to claim refund would only arise after determination of the correct classification as directed by mis Court. Any application for refund of excise duty in a case where the assessments have been quashed, if preferred, prior to fresh assessments, would be wholly premature. No right to claim a refund can accrue unless fresh orders of assessments in accordance with the directions of this Court in the said C.R. No. 814 (W) of 1978 were made.

34. The provisions of Rule 173-I is relevant in this behalf. The assessments which the officer was required to make in terms of the orders of this Court in the said C.R.No. 814 (W) of 1978 was to be made under Rule 173-I. The said Rule is in the following terms

173-I. Assessment by proper officer.- (1) The proper officer shall on the basis of the information contained in the return filed by the assessee under Sub-rule (3) of Rule

173 G and after such further inquiry as he may consider necessary, assess the duty due on the goods removed and complete the assessment memorandum on the return, a copy of the return so completed shall be sent to the assessee.

(2). The duty determined and paid by the assessee under Rule 173 F shall be adjusted against the duty assessed by the proper officer under Sub-rule (1) and where the duty so assessed is more than the duty determined and paid by the assessee, the assessee shall pay the deficiency by making a debit in the account-current within ten days of receipt of copy of the return from the proper officer and where such duty is less, the assessee shall take credit in the account-current for the excess on receipt of the assessment order in the copy of the return duly counter-signed by a superintendent of Central Excise.

35. Thus it would be evident from the said Rule that the liability to pay the duty in case of short payment or right to obtain refund in case of excess payment arises after the assessment is made, such refund is to be granted immediately and the assessee is entitled to take credit in the account-current for the excess sum paid on receipt of the assessment order. No application for refund is required to be made in such circumstances. There is also no period of limitation for making any such claim for refund since the right to obtain the refund flows form the assessment order itself.

36. In raising the purported plea of limitation the respondents are acting contrary to the judgment of this Court which is final and binding on them. In terms of the said judgment they were to pass the orders of assessment and/or refund for the entire period from April 1970 to February 6. 1978. The respondents are seeking to over-reach the judgment and Order of this Court.

37. That apart where the duties of excise were collected wholly without jurisdiction and illegally, as in the instant case, the respondents are bound to refund the same and the plea of limitation cannot be taken by the excise authorities to defeat a just claim.

38. The respondents have alleged that the grant of refund to the petitioners would amount to their unjust enrichment and as such their claim for such refund should not be accepted. This principle, if any, can have no application on the facts and in the circumstances of the case. The respondents are bound to pass order of assessment in terms of the order of this Court in C.R. No. 814 (W) of 1978. The respondents are estopped from raising any plea contrary to the said Judgment and order which have become final and binding. Further any amount of refund which is due to an assessee on the completion of an order of assessment cannot be withheld on the ground of unjust enrichment. If such a plea were to prevail then it would make the assessments meaningless and futile. The liability to pay the duty of excise is of the manufacturer. Any liability for any duty that might have been short-paid earlier would be recoverable only from the manufacture and such recovery by the

Department is not going to be quashed on the ground that the assessee had short-realised the. duty form the customers. On the same analogy the assessee cannot be denied the right to get refund on the assumption that the duty of excise has been recovered from the buyer. It is further submitted that it is not correct to state that any duty of excise is recovered by the manufacturer from his buyer. The buyer does not pay anything by way of excise duty which is payable only by the manufacturer. What the buyer pays is the consideration for the purchase of the goods and the composition of such consideration is wholly irrelevant for the purpose of determining the issue as to who pays the duty of excise. In this connection the following passage from the decision of the Supreme Court in the case of Hindustan Sugar Mill Ltd. v. State of Rajasthan reported in 43 STC 13 Raj may be referred to:

The definition of ''sale price'' is given in Section 2(p) and, according to that definition, it means:

''...the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery or the cost of installation in case where such cost is separately charged.''

This definition is in two parts. The first part says that ''sale price'' means the amount payable to a dealer as consideration for the sale of any goods. Here, the concept of real price or actual price retainable by the dealer is irrelevant. The test is, what is the consideration passing from the purchaser to the dealer for the sale of the goods. It is immaterial to enquire as to how the amount of consideration is made up, whether it includes excise duty or sales tax or freight. The only relevant question to ask is as to what is the amount payable by the purchaser to the dealer as consideration for the sale and not as to what is the net. consideration retainable by the dealer.

Take for example, excise duty payable by a dealer who is a manufacturer. When he sells goods manufactured by him, he always passes on the excise duty to the purchaser. Ordinarily, it is not shown as a separate item in the bill, but it is included in the price charged by him. The ''sale price'' in such a case could be the entire price inclusive of excise duty because that would be the consideration payable by the purchaser for the sale of the goods. True, the excise duty component of the price would not be an addition to the coffers of the dealer, as it would go to reimburse him in respect of the excise duty already paid by him on the manufacture of the goods. But, even so, it would be part of the ''sale price'' because it forms a component of the consideration payable by the purchaser to the dealer. It is only as part of the consideration for the sale of the goods that the amount representing excise duty would be payable by the purchaser. There is no other manner of liability, statutory or otherwise, under which the purchaser would be liable to pay the

amount of excise duty to rise dealer. And, on this reasoning, it would make no difference whether the amount of excise duty is included in the price charged by the dealer or is shown as a separate item in the bill. In either case, it would be part of the ''sale price''.

39. The Supreme Court again in the case of McDowell and Co. Ltd. Vs. Commercial Tax Officer, approved the above enunciation of the law in the case of Hindustan Sugar Ltd. (Supra).

40. This Court in Khardah Co. Ltd. v. Union of India 1983 ELT 2159, Gonterman Peipers (India) Limited Vs. Additional Secretary to the Government of India, , Calcutta Paper Mills Manufacturing Co. Vs. Customs, Excise and Gold (Control) Appellate Tribunal and Others, and Dilichand Shreelal Vs. Collector of Central Excise and Others, held that the amount of refund due to the assessee cannot be withheld on the ground of unjust enrichment.

41. For the reasons aforesaid, this application must be allowed. The Rule is made absolute. Let appropriate writs be issued.